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VIA FACSIMILE (LETTER ONLY)
AND REGULAR MAIL

Karen E. Torrent, Esq.
United States Department of Justice
Environmental and Natural Resources Division
Environmental Enforcement Section
Post Office Box 7611
Washington, DC 20044-7611

Re: Sauget Area 1, Site G, St. Clair County, Illinois

Dear Ms. Torrent:

This office represents Cerro Copper Products Co. ("Cerro") in the above referenced matter. The United States Environmental Agency ("USEPA") has asserted that Cerro is a potentially responsible party ("PRP") for Site G, a five acre parcel located south of new Queeny Avenue between Dead Creek and Route 3 in Sauget, Illinois, by virtue of Cerro's fee title ownership of a small, ¾ acre portion of the five acre Site. For the reasons set forth below, we submit that Cerro is not a PRP for Site G because it is entitled to the innocent landowner defense set forth at Sections 101(35) and 107(b)(3) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. Sections 9601(35) and 9607(b)(3). Alternatively, and at the very least, Cerro is a *de minimis* landowner pursuant to Section 122(g) of CERCLA, 42 U.S.C. Section 9622(g)and eligible for a settlement on that basis.

FACTS[1]

On July 26, 1948 the Lewin-Mathes Company (a Cerro predecessor) contributed property to the Village of Sauget (at that time the Village of Monsanto) for consideration of $1.00. The property was conveyed for public purposes only, namely, to build new Queeny Avenue. The construction of new Queeny Avenue did not require use of the entire property conveyed by Lewin Matthes. Thus, on February 7, 1969, the Village of Sauget re-conveyed to Cerro for $100 title to a ¾ acre parcel located adjacent to and immediately south of new Queeny Avenue. Cerro has held title to

[1] Unless otherwise indicated, the facts set forth herein are based on Cerro's Section 104(e) Response dated June 24, 1987 and enclosed herewith as Exhibit A (hereinafter "Cerro 104(e) Response").

this parcel continuously since that time. Cerro's fee title ownership of this parcel, which was ultimately included in the description of Site G, is the sole basis for the EPA's assertion of liability against Cerro.

The ¾ acre parcel is and always has been undeveloped land. When the Village of Sauget owned the land, a portion of it may have been used as a borrow pit for road construction and later filled and re-graded. Cerro is aware of no information to suggest that the Village used anything other than clean fill on Cerro's ¾ acre. The ¾ acre parcel is physically separated from Cerro's plant by new Queeny Avenue. Cerro has never conducted any commercial or industrial activity on the parcel, never permitted others to conduct such activity and never purchased, received, processed, stored, treated or otherwise handled hazardous substances on the parcel. Similarly, Cerro has never disposed of hazardous substances on the parcel or permitted others to do so.

Cerro has consistently cooperated with both the USEPA and the Illinois Environmental Protection Agency ("IEPA") in their efforts with respect to Site G. In 1987, Cerro granted IEPA access to the property to investigate potential soil and groundwater contamination and permitted the IEPA to install two groundwater monitoring wells on the ¾ acre parcel. Also in 1987, pursuant to Section 104 of CERCLA and Section 3007 of the Resource Conservation and Recovery Act l("RCRA"), the USEPA requested that Cerro furnish information describing the company's involvement with Site G. Cerro complied. Cerro contributed to the cost of a fence that was erected around all of Site G in 1987. In 1995, Cerro gave the USEPA access to its portion of Site G to allow the agency to conduct a removal action. In 1994, Cerro responded fully and candidly to a second USEPA request for information. Most recently, Cerro signed a Tolling Agreement with USEPA to facilitate negotiations regarding the USEPA's cost recovery claim for Site G removal action costs.

ARGUMENT

I. CERRO IS ENTITLED TO THE INNOCENT LANDOWNER DEFENSE

CERCLA imposes liability on a property owner for the government's costs of responding to releases or threatened releases of hazardous substances on or from the property. 42 U.S.C. § 9607(a). However, a property owner will not be liable if it: (1) acquired the property after the disposal of hazardous substances occurred; (2) did not know or have reason to know that hazardous substances were disposed on the property; (3) exercised due care respecting the hazardous substances, and (4) took precautions against the foreseeable actions or omissions of third parties that would aggravate the conditions on the property. 42 U.S.C. Sections 9601(35) and 9607(b)(3)(b). In this case, each of these factors point to Cerro's entitlement to the innocent landowner defense.

First, Cerro acquired the ¾ acre parcel after any alleged disposal of hazardous substances would have occurred on it.[2] Since 1969, when Cerro purchased the property from the Village, Cerro never used it or permitted others to use it for any commercial, industrial or disposal activity. The USEPA has identified Monsanto Corporation and Mobil Oil Corporation as the two alleged generators of hazardous substances at Site G. Cerro never permitted these companies to dispose of materials on its property.

Second, Cerro did not know or have reason to know of the disposal of hazardous substances before it acquired the property in 1969. A landowner establishes that it had no reason to know of the disposal of hazardous substances upon its property if it undertook an "appropriate inquiry" into the previous ownership and uses of the property. 42 U.S.C. §9601(35)(B). This inquiry must be "consistent with good commercial and customary practice," which depends, in part, on the specialized knowledge or experience of the landowner, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence of contamination at the property, and the ability to detect such contamination by appropriate inspection. Id.

In 1948, Cerro's predecessor contributed a large piece of undeveloped property to the Village for the construction of new Queeny Avenue. The ¾ acre parcel that Cerro purchased from the Village in 1969 was leftover after the roadway was completed. Because Cerro's predecessor transferred the property to the city originally, and the city owned it continuously until the parcel was transferred back to Cerro in 1969, all "appropriate inquiry" into the previous owners and uses of the property was complete because all previous owners and uses were known.

Given the time period of the transaction and the nature of the prior ownership of the property "good commercial and customary practice" would not have dictated any investigation into the potential for hazardous substance disposal on the property. In 1969, the kind of contamination that is at issue on Site G was not even an issue for the regulators, much less private industry. RCRA was seven years and CERCLA was eleven years from enactment. Neither the USEPA nor the IEPA were even in existence. The concept of "hazardous substances" had in no way been defined. Indeed, the disposal method of choice for most wastes was burial. In this context, the idea of environmental due diligence, especially for the reacquisition from a public entity of property that one had previously owned, was unheard of.

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[2] After over ten years of investigation and a comprehensive USEPA removal action, Cerro has seen no evidence that hazardous substances were actually disposed of on the ¾ acre parcel to which Cerro holds title. If, in fact, no such disposal occurred on this parcel, then Cerro has no liability under Section 107 of CERCLA, irrespective of the innocent landowner defense. The arguments that follow assume, however, that such disposal occurred.

Additionally, Cerro had no reason to suspect that the purchase price signaled a defect in the property. Cerro paid $100.00 for a small portion of a parcel of land the entirety of which it had conveyed to the Village for $1.00. Cerro knew that part of Site G, perhaps even a portion of its ¾ acre parcel, was used as a borrow pit and re-graded with fill, but in 1969, this was a common means of reclaiming land and in no way suggested the presence of contamination. Finally, contamination of the ¾ acre parcel was never obvious. Indeed, after twelve years of study neither the USEPA nor the IEPA has established conclusively that the ¾ acre parcel was contaminated. Cerro can not be charged with knowing in 1969 that which is not even obvious today after years of aggressive scientific investigation.

Third, to the extent that the ¾ acre parcel might be contaminated, Cerro has exercised due care regarding the alleged contamination. Cerro has cooperated with state and federal authorities. It has granted access to IEPA to conduct an investigation and to USEPA to conduct a removal action. It has permitted the IEPA to install two monitoring wells on the parcel. It has contributed to the cost of fencing the Site. Recently, Cerro entered into a tolling agreement with the USEPA to facilitate negotiations regarding the USEPA's cost recovery claims for Site G. Moreover, Cerro has in no way contributed to or exacerbated any contamination that might exist on its ¾ acre parcel. Cerro has neither altered any part of the parcel nor conducted or permitted activities that would cause any contamination that might be there to migrate.

Finally, by cooperating with authorities and participating in the fencing of the Site, Cerro has taken precautions against the foreseeable actions or omissions of third parties that could aggravate conditions on the property.

A recent line of cases from the Seventh Circuit further supports Cerro's entitlement to the innocent landowner defense. In each of these cases, the Court was faced with the question of whether a landowner that incurs response costs remediating its own property may bring a cost recovery action under Section 107 of CERCLA or whether the landowner is limited to a contribution action under Section 113 of CERCLA. In each case, the court ruled that if the landowner is itself a liable party, then it is limited to a contribution action under Section 113. If, on the other hand, the landowner is an "innocent landowner" then it may bring a cost recovery action under Section 107. In reaching these results, the court in each case, described an "innocent landowner" as one on whose property others dump hazardous materials before the landowner owned the property. See generally, Akzo Coatings Inc. v. Aigner Corp., 30 F.3rd 761, 764 (7th Cir. 1994); Rumpke of Indiana Inc. v. Cummins Engine Company, Inc., 107 F.3rd 1235, 1241-1242 (7th Cir. 1997); Estes Industrial Center v. Scotsman Group Inc., 1998 U.S. Dist. LEXIS 14566 (C.D. Ill. 1998).

Cerro falls squarely within this definition of an innocent landowner. Any dumping that occurred on the ¾ acre portion of Site G for which Cerro holds title occurred prior to the time that Cerro re-acquired the property from the Village. There is no indication that Cerro knew or had reason to know of any such dumping when it re-acquired the property. Cerro is, thus, entitled to the innocent landowner defense for the ¾ acre portion of Site G that it owns.

II. CERRO IS ELIGIBLE FOR A *DE MINIMIS* SETTLEMENT FOR SITE G

Even if the United States questions Cerro's entitlement to the innocent landowner defense, there can be no question that Cerro is eligible for a *de minimis* landowner settlement pursuant to Section 122(g) of CERCLA, 42 U.S.C. Section 9622(g).

Section 122(g) permits the United States to settle when it is practicable, in the public interest, and the circumstances involve a minor portion of the response costs at a facility. The owner of contaminated property may qualify for a *de minimis* settlement if (1) it did not conduct, permit, or contribute to the contamination on the property; (2) did not know the property was contaminated when purchased; and (3) has exercised due care since the purchase. 42 U.S.C. § 9622(g)(1)(B).

These elements mirror the requirements of the USEPA's guidance document on the issue. See Guidance on Landowner Liability under Section 107(a)(1) of CERCLA (June 6, 1989). According to this policy, a *de minimis* settlement depends on the landowner's actual or constructive notice that hazardous substances were on the property at the time of purchase, the affirmative steps taken by the landowner to determine the previous ownership or uses of the property, the condition of the property at the time of purchase, the purchase price and fair market value of the property if uncontaminated, any specialized knowledge relevant to the landowner's inquiries and information regarding the exercise of due care.

As indicated above, each of these elements weighs in favor of Cerro's entitlement to a *de minimis* landowner settlement. Cerro had no actual or constructive notice that hazardous substances were on the property at the time it re-acquired it from the Village. Nothing in the condition of the property or the purchase price would suggest the presence of any contamination, and Cerro has exercised due care since it re-acquired its ownership interest in the property.

Arguably, Cerro would be eligible for a *de minimis* settlement even if it owned all of Site G. That it owns only a ¾ acre portion of this five acre Site conclusively establishes the appropriateness of a *de minimis* settlement.

CONCLUSION

For the reasons set forth herein, Cerro submits that it has a complete defense to liability for conditions at Site G. Nevertheless, Cerro is willing to engage in negotiations with the United States for a *de minimis* settlement of the United States' claims against Cerro relating to Site G. We will look forward to your response.

Very truly yours,

Richard F. Ricci
RFR:jcg
Enclosure(s)
cc: (w/enc.) Thomas J. Martin, Esq.
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